CANCELLATION OF REMOVAL AND VOLUNTARY DEPARTURE

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CANCELLATION OF REMOVAL FOR NON-LPRS

CANCELLATION OF REMOVAL FOR LPRS

Oral Presentation by Maureen O'Sullivan
Updated 10/18/18

2 Types of Cancellation of Removal

For Non-LPRs
INA § 240A(b)(1)

10 years continuous physical presence
(Unless VAWA, see special rules 240A(b)(2))

Service of *Pereira*-compliant NTA stops time

For LPRs
INA § 240A(a)

5 years LPR
7 years continuous residence in any status

Service of NTA stops 7 years*

Commission of an offense referred to in 212(a)(2) that renders Respondent inadmissible under 212(a)(2) or removable under 237(a)(2) or (4) also stops time.

Good moral character

No conviction for specified offense:

- CIMT
- Controlled substance
- Firearms offense
- Domestic violence (after 9/30/96), etc.

Petty offense may render ineligible if CIMT and sentence of 1 year could have been imposed

Exceptional and extremely unusual hardship to qualifying relative(s): USC and LPR parent, spouse, and children

Factors
- Age, health, and circumstances of qualifying relatives - Conditions in home country - Dependence of qualifying relatives on Respondent - Access to medical care, education, sanitation, and food - Family ties in U.S. and abroad

Grant confers LPR; subject to annual CAP

Filed on Form EOIR-42B

*The Supreme Court in *Pereira v. Sessions*, 585 U.S. ____ (2018) held that an NTA that fails to designate the specific time and place of removal proceedings is not an NTA under section 239(a) of the Act, thus failing to trigger the stop time rule in non-LPR cancellation cases and raising the question of whether that applies to LPR cancellation.

Firearms offense does not stop time

Petty offense does NOT make ineligible

Hardship not required but may be a factor:

Positive Factors	Negative Factors
- Family ties in the U.S. - Length of U.S. residence - Hardship to Respondent and family if removed - U.S. military service - Work history - Property/business ties - Community service - Rehabilitation if criminal record exists	- Nature/circumstances of the grounds of removal - Additional significant violations of U.S. immigration laws - Criminal record and its nature, recency, and seriousness

Grant retains LPR; no CAP

Filed on Form EOIR-42A

Ineligible for either type of cancellation of removal if:

- Convicted of an aggravated felony
- Previously granted cancellation, suspension of deportation under old 244(a), or 212(c) waiver
- Alien entered as crewman after June 30, 1964
- Certain aliens admitted as J nonimmigrant or later acquiring such status (*see* 240A(c)(2), (3)).
- Inadmissible under 212(a)(3) or removable under 237(a)(4) (security grounds)
- Alien described in 241(b)(3)(B)(i) (persecutor of others)

See INA § 240A(c).

Non-LPR Cancellation Hypo

The NTA shows a Respondent named Maria Lopez. She is a citizen of Mexico charged under INA § 212(a)(6)(A)(i) for being present without admission or parole. She signed the NTA when she was personally served with it on September 1, 2015.

Maria admitted and conceded removability and filed for cancellation of removal for non-LPRs (Form EOIR-42B). This shows that she has lived in the US since January 2002. She has two children; Lupe, age sixteen, who was born in Mexico, and Silvia, age six, who was born in Boston. She also has a mother who is an LPR. All four live together in Boston.

Lupe is an honor student at Boston Latin High School. Silvia is a first grader and idolizes her sister, Lupe. Silvia was born with a club foot. This has been treated at Boston Children's Hospital with a series of operations, casting, and braces since she was an infant. Maria supports the family by working in housekeeping at a local hotel. Her mother is sixty and has diabetes. She takes care of the home and she has filed a visa petition for Maria, which is not yet current.

You see that the application shows that Maria took a trip to Mexico in February 2010, when her father died. She stayed for a couple of months and was stopped and sent back to Mexico twice before she managed to return to the United States in May 2010, without inspection.

Maria has a conviction for simple battery in August 2015. You see from the court records that she was arrested and originally charged with assault and battery with a dangerous weapon (a cell phone). However, she pled guilty to simple battery and was given six months probation. She also has an old DUI from 2008. The DUI conviction is in another name because Maria was using a false driver's license at that time.

Maria was married to John who is Silvia's father. John is a U.S. citizen and works at the same hotel as Maria. He was violent and abusive to Maria, but she tolerated it and never called the police because of her immigration status. When Lupe tried to defend her mother, John began to abuse Lupe as well. This is when Maria changed the locks and filed for divorce last year, but John refused to move out. He kept coming back to the house which prompted further altercations with Maria. John was the "victim" in the battery case, which happened when Maria threw her cell phone at him.

1. Discuss Maria's eligibility for cancellation of removal.

2. Discuss the impact of her departure, if any, on her application for cancellation.

3. Discuss the impact of her criminal record on her application for cancellation of removal and on other remedies she might seek.

4. What, if any, other remedies might be available to her? How might you handle issues that relate to applications with USCIS?

5. What about Lupe? What is her impact on the case if any? What if she is the child that was born with the club foot?

UNITED STATES DEPARTMENT OF JUTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BOSTON, MASSACHUSETTS

In the Matter of: _____ In _____ Proceedings
A: _____
Charge(s): _____
Application(s): **Cancellation of Removal for Nonpermanent Residents, INA section 240A(b)(1)**
On Behalf of Respondent: _____
On Behalf of DHS: _____

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a _____ year-old native of _____ and citizen of _____. (He/she) seeks cancellation of removal based on hardship to _____.

Removability

The Respondent was placed in removal proceedings when the Notice to Appear was filed with the Immigration Court on _____. The NTA charges the Respondent with _____ under INA section(s) _____. The Respondent, (through counsel), has previously admitted and conceded the allegations and charges in the NTA. [or DHS bears the burden of proving removability by clear and convincing evidence and insert analysis…]. I find that the Respondent is removable as charged and designate _____ as the country of removal if necessary.

Statement of the Law

Cancellation of removal for certain nonpermanent residents is available to an alien who: (a) has been physically present in the U.S. for at least 10 years; (b) has been a person of GMC during that period; (c) has not been convicted of certain specific offenses; and (d) has established that removal would result in "exceptional and extremely unusual hardship" to the alien's spouse, parent, or child(ren) who is a USC or LPR. *See* section 240A(b) of the Act.

Aliens Not Eligible for Cancellation:

1) Previously granted cancellation, suspension of deportation under old 244(a), or 212(c) waiver
2) Alien entered as crewman after June 30, 1964
3) Certain aliens admitted as J nonimmigrant or later acquiring such status (*see* 240A(c)(2), (3)).
4) Inadmissible under 212(a)(3) or removable under 237(a)(4) (security grounds)
5) Alien described in 241(b)(3)(B)(i) (persecutor of others)

See INA § 240A(c).

Analysis of Statutory Requirements for Non-LPR Cancellation of Removal:

1) **<u>10 years continuous physical presence in the U.S.</u>**

-- **Stop-Time Rule** (*see* INA § 240A(d)(1)): Continuous physical presence ends at the *earliest* of: service of the *Pereira*-compliant NTA *or* commission of an offense referred to in 212(a)(2) that renders the alien inadmissible under 212(a)(2) or removable under 237(a)(2) or 237(a)(4)
-- Continuity broken by single departure of over 90 days *or* aggregate departures of over 180 days
-- Turn back at border does NOT break continuous physical presence. *Matter of Avilez-Nava*, 23 I&N Dec. 799 (BIA 2005). If right to a hearing, must show waiver of that right to break continuous presence. *Matter of Castrejon-Colino*, 26 I&N Dec. 667 (BIA 2015).
-- Continuity not required in certain cases of honorable service in U.S. Armed Forces. (*See* 240A(d)(3)).

2) **<u>Good moral character</u>**

-- Required for same period as physical presence (10 years unless VAWA)
-- INA § 101(f) lists factors that **preclude** a finding of GMC, including: imprisonment of 180 days or more; false testimony; aggravated felony; certain criminal offenses, etc.
    - IJ not limited to these factors in assessment of GMC

3) **<u>No convictions for specified offenses</u>**

-- Offenses described under section 212(a)(2), including:
- CIMT
- Controlled substance offenses
- Trafficking, etc.

-- Offenses described under section 237(a)(2), including:
- CIMT (even a petty offense)
- Domestic violence or violation of restraining order (must be AFTER 9/30/96)
- Firearms offenses
- Aggravated felony

-- Offenses described under section 237(a)(3), including:
- Falsification of documents (conviction)

-- Note: A conviction for a CIMT offense "described under" 237(a)(2) may render an alien ineligible for non-LPR cancellation if a sentence of 1 year could have been imposed; this is despite the petty offense exception and even though it does not stop time. *See Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018) (reinforcing a backward looking inquiry to the maximum possible sentence at the time of conviction despite a later amendment to the California statute); *Matter of Ortega-Lopez*, 27 I&N Dec. 382 (BIA 2018) (reaffirming *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010) in light of *Lozano-Arredondo v. Sessions*, 866 F.3d 1082 (9th Cir. 2017), which called

Matter of Cortez into question); *see also Matter of Hernandez*, 26 I&N Dec. 464 (BIA 2015).

4) <u>Exceptional and Extremely Unusual Hardship</u>

To establish "exceptional and extremely unusual hardship," an alien must demonstrate that the qualifying family member would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the alien's deportation, but need not show that such hardship would be unconscionable. *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).

-- Must consider hardship in the aggregate to qualifying relatives (USC/LPR parent, spouse, and child (under 21))
-- Factors to consider include: age, health, and circumstances of qualifying relatives, conditions in home country, dependence of qualifying relatives on Respondent, access to medical care, education, sanitation, and food, and family ties in U.S. and abroad
  - Hardship evaluation not limited to these factors
  - May evaluate hardship to qualifying relatives if they go with the Respondent or if they stay in the U.S. without him/her
  - Hardship to the Respondent is NOT a factor by itself, but the Respondent's condition may impact hardship to qualifying relatives (i.e., poor health, minimal education or job skills, and bars to lawful return to the U.S.)
-- Hardship Case Examples:
  - *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002): grant; Respondent is single mom and sole supporter of 4 USC kids; no family in Mexico; Respondent's USC kids raised entirely in U.S. and do not speak Spanish well
  - *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002): denial; economic detriment alone is insufficient; although 2 USC kids would be denied educational benefits, not totally deprived of schooling [may distinguish if special education needs]
  - *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001): denial; Respondent in good health and can still support USC family if deported; Respondent's USC children will be reunited with mother in Mexico
-- Discretion: Other factors may weigh in the exercise of discretion.

<u>Special Rules for Cancellation of Removal Under VAWA (240A(b)(2)(A))</u>

-- Applies to battered spouse or child of USC or LPR (includes victims of extreme cruelty)
  - Includes certain parents of battered child and covers bigamous marriage
-- More lenient requirements (bars to eligibility (240A(c)) not applicable):

<u>Physical Presence</u>
  - Only 3 years required
  - Absences connected to battery or extreme cruelty do not break continuous presence

<u>Good Moral Character</u>
  - IJ may find GMC despite 101(f) and certain limited acts or convictions which are connected to the alien's having been battered or subjected to extreme cruelty (*see* 240A(b)(2)(c))

Hardship

- Requires showing of "extreme" hardship only and includes hardship to the Respondent and his/her child or parent.

Crimes/Fraud

- Removability for marriage fraud under 237(a)(1)(G) or conviction for an aggravated felony also bar VAWA cancellation.
- Some crimes may be waived under 237(a)(2) when the Respondent has been a victim of battery and is not the primary perpetrator of violence. *See* 240A(b)(5).

I. What is a hardship determination?

When a non-citizen is removable from the United States, he or she may be eligible to apply for certain forms of relief from removal. Each of these forms of relief has very strict eligibility requirements. An alien cannot get relief from removal simply by showing that he or she is a good person, would be an upstanding citizen, or has relatives in the United States.

Some forms of relief require that the applicant establish his or her removal would result in a minimum level of hardship to the alien or his or her United States citizen or lawful permanent resident parents, spouse, or children. Relatives whose hardship can be considered are known as "qualifying relatives."

Importantly, the hardship must be directly tied to the removal itself. Hardship which the relative would suffer even if the applicant remains in the United States cannot be considered for these kinds of relief.

EXAMPLE

A Mexican national needed to establish a certain level of hardship to his United States citizen wife, who was his sole qualifying relative. She had been diagnosed with an aggressive form of cancer, but she would remain in the United States if her husband was removed and would continue to receive treatment.

The respondent submitted many medical records establishing that his wife was being treated for cancer, but he did not submit any evidence regarding how his wife's treatment, prognosis, or state of health would be impacted by his removal. Therefore, while she was certainly experiencing "hardship" in the colloquial sense, the respondent was unable to show that his removal would be the cause of the necessary level of hardship. His application was denied. **LIKELY REMAND.**

II. Considerations in a Hardship Determination

a. An Immigration Judge may consider many kinds of potential hardship. Some illustrative examples include:

   i. Conditions in the country of removal which would be faced by the qualifying relatives if they accompany the applicant;

      This might include such things as the presence of ongoing conflict, widespread criminality, the availability and quality of schooling,

medical infrastructure and the availability of care, economic factors, potential discrimination against the applicant's family because of social or cultural issues

ii. Special medical, psychological, or educational needs of qualifying relatives which would be affected by the removal;

An Immigration Judge may want to know about even seemingly minor needs. Some needs which can be easily resolved in the United States may be difficult to address in other countries, or may have social significance there which could impact the relative's life in other ways. An Immigration Judge looks at the cumulative level of hardship, and so needs a comprehensive picture of all the qualifying relatives' circumstances.

iii. Emotional ties between the applicant and his qualifying relatives, and how seriously those ties might be interrupted; and

iv. If the qualifying relatives would accompany the applicant, the relatives' acculturation to and length of residence within the United States, their ages, and their adaptability to the country of removal.

If a qualifying relative's adaptability may be impacted because of medical, educational, developmental, or psychological issues, that should be explicitly set out in any evaluation of the qualifying relative

EXAMPLE

An applicant from Nicaragua had two qualifying relatives, one of whom was his 15-year-old United States citizen daughter. The daughter had been diagnosed two years prior with mild depression and adjustment disorder, after her father had been placed into removal proceedings.

Shortly before the final hearing, the applicant's 18-year-old nephew – with whom his daughter had been close – committed suicide. The daughter's psychologist wrote a letter to the Immigration Court regarding the long-term impact this would likely have on the daughter, and highlighting research into suicide "clustering."

Based on these factors in the family's circumstances, the application was granted.

b. Corroborating evidence is very important when an applicant attempts to establish hardship. This evidence typically consists of medical records, copies of prescriptions, psychological evaluations, Individual Education Plans, and letters from care providers.

Immigration Judges typically do not have training in medicine or medical terminology, and may have trouble interpreting the severity of a diagnosis or prognosis if it is not explained in lay terminology. The best letters documenting medical, psychological, or educational needs:

i. Set out a specific diagnosis;
ii. Explain the basis for the diagnosis;
iii. Explain in lay terminology what that diagnosis means for the patient, including any psychological, medical, or educational needs which usually accompany the patient's diagnosed challenges;
iv. Explain what treatment is necessary, including duration of the treatment, how often the patient would need to be seen, and any medications the treatment would require;
v. Explain what the prognosis will be with treatment; and
vi. Explain what the prognosis would be without treatment, or what the prognosis would be if the treatment was provided only partially or intermittently

EXAMPLE

An applicant from Guatemala submitted a physician's letter indicating that the applicant's qualifying-relative son suffered from Fragile X syndrome. However, the letter did not explain what "Fragile X syndrome" entails, or set forth what kind of treatment (if any) the child would need or how he would be affected by removal to Guatemala. Though not required to do so, the Immigration Judge gave the alien an opportunity to submit more evidence. However, the alien was only able to print information off the internet explaining the syndrome in general.

Other hardship factors mandated a grant of cancellation in this case, but in another case the lack of information in the physician's letter might have proved fatal to the application.

c. Each of form of relief which mandates a hardship showing has different requirements regarding who the hardship must affect and how severe the hardship must be. Of the forms of relief which require hardship, the most commonly sought is referred to as cancellation of removal for non-permanent residents (or simply "cancellation of removal" or "cancellation"). This form of relief requires that the applicant establish his or her United States citizen or lawful permanent resident spouse, parents, or children (under the age of 21) would experience "exceptional and extremely unusual hardship."

III. Cancellation of Removal and Exceptional and Extremely Unusual Hardship

a. Cancellation of Removal Requirements

To be eligible for cancellation of removal, an alien must meet all of these requirements:

i. 10 years of continuous physical presence in the United States prior to being put into removal proceedings
ii. No disqualifying criminal convictions
iii. Good moral character during the previous 10 years
iv. A showing that the removal would result in:
    a. exceptional and extremely unusual hardship, cumulatively,
    b. to the alien's United States citizen or Lawful Permanent Resident
    c. spouse, parent, or child
v. This form of relief is discretionary, so even if an applicant meets these requirements the application may be denied if there are serious adverse factors

b. What "Exceptional and Extremely Unusual Hardship" Means

i. The hardship must be "substantially beyond" what would ordinarily result from an alien's removal

EXAMPLE

An applicant from El Salvador had two qualifying relative children, one of whom had been diagnosed with Attention Deficit Hyperactivity Disorder. The child had an Individual Education Plan, which indicated that he was in a mainstream class, was given biweekly meetings with a school counselor, and his parents had been given tips for how to help him complete his homework.

The child would not receive that assistance in El Salvador. In addition, his father (the applicant) would likely have to spend time away from the

family to obtain employment. The family's financial security would decrease, and the children would be separated from extended family in the United States.

The Immigration Judge recognized that the child would likely struggle in school and that the relocation may exacerbate the ADHD symptoms, but reasoned that the evidence did not show the impact on the child's schooling would be severe. The Immigration Judge concluded that the cumulative hardship was not "substantially beyond" that which might ordinarily be expected from an alien's removal. The application was denied.

IV. Published Caselaw

a. Matter of Monreal

The applicant was a 34 year old native and citizen of Mexico, who had originally come to the United States at the age of 14. His wife and infant United States citizen child were residing in Mexico. Their two older children, aged 12 and 8, were both United States citizens and resided with their father in the United States, and both spoke some Spanish. They would accompany their father to Mexico if he was removed. The applicant's parents were both lawful permanent residents, and most of his siblings also lived in the United States; they would remain in the United States.

The hardship in this case, which included a lower standard of living, fewer educational opportunities for the children, adjustment to a different culture, and separation from family members, did not constitute exceptional and extremely unusual hardship.

b. Matter of Andazola

The applicant was a 30 year old native and citizen of Mexico, who had first entered the United States at the age of 15. She had two United States citizen children, aged 11 and 6. She was unmarried, though her children's father resided with them and contributed to the household. All of her relatives were in the United States, though they were mostly present unlawfully. She owned a house with approximately $69,000 in equity, had two vehicles worth a combined $11,000, and had approximately $7,000 in savings. She had a sixth grade education, and had asthma which would prevent her from doing agricultural work in Mexico.

The Board acknowledged that the family would face a significantly reduced standard of living and that the children would not have access to an equivalent education, but noted the children would not "be deprived of all schooling." The Board also noted that she had some assets which could be liquidated to help the family adjust. She had not established her children would cumulatively suffer exceptional and extremely unusual hardship.

c. Matter of Recinas

The applicant was a 39-year-old native and citizen of Mexico. A single mother, she had sole responsibility for six children, four of whom were United States citizens. Her parents were lawful permanent residents, and all of her siblings resided lawfully in the United States – she had no family remaining in Mexico. She had $4,600 in assets in the form of an automobile, but would have a very difficult time obtaining any work in Mexico, particularly as she relied on her mother to provide childcare.

The Board concluded that the cumulative hardship of the four children and two lawful permanent resident parents met the standard, but stated this represented the "outer limit" of what would constitute exceptional and extremely unusual hardship.

Chart: Sample Organization of Evidence

Cancellation for Non-Permanent Residents	Documents	Testimony	Other
10 Years Presence	Ex. 1: School Record Ex. 3: Utility Bill Ex. 5: Pay Stub	Neighbor Employer	
Good Moral Character	Ex. 6: Certificate Ex. 8: Friend Letter	Sister Pastor	Proffer re: Brothers
No Disqualifying Conviction	Ex. 9: State Clearance		Stipulated
Exceptional & Extremely Unusual Hardship	Ex. 10: Marriage Certificate Ex. 11: D's Birth Certificate Ex. 12: Medical Doc.	Dr. Smith Teacher Daughter	
Discretion	Ex. 13: Church Letter Ex. 14: Charity Letter	Respondent	

PROCEDURES DUE TO THE CAP ON NON-LPR CANCELLATION

General Guidelines:

Note: Cancellation of removal for non-LPRs (INA 240A(b)(1)), VAWA cancellation (INA 240A(b)(2)), and suspension of deportation cases (old INA 244) are all subject to the 4,000 annual cap; NACARA cases are not.

Once the cap has been reached, an IJ cannot grant a cap-subject application unless the Respondent is detained. The IJ may deny or pretermit the application; however, to grant one of these applications, the IJ must reserve a decision until a number becomes available under the annual cap. The procedure for reserving decisions is discussed in detail in the Operating Policies and Procedures Memorandum 17-04. This OPPM is included in these training materials. What follows here is a brief summary of the procedure for reserving a decision. Remember**, detained cases may be decided without reserving a decision.**

Procedures:

To reserve a decision:

- Note the time and date when the hearing is finished.
- Ask DHS to confirm that the background checks are current and complete and to state the date that the checks will expire.
- Prepare the draft reserved decision either by dictating a draft oral decision or preparing a draft written decision. The OPPM 17-04 contains deadlines for both options.

Draft oral decision. This should be dictated within 15 working days outside the presence of the parties. The IJ must use the electronic Microsoft Recorder System on the IJ's workstation. This dictated draft will be transcribed and returned to the IJ who will have an additional 5 days to edit the draft.

Draft written decision. This should be completed within 60 days of the hearing.

The draft decision will be placed in the queue for the annual cap.

- Note: Consult your court administrator to be sure you understand the worksheet or stamp that your court uses for reserved decisions. This will ensure that your decisions are placed in the queue by the proper time and date.
-

To issue a final decision when a number becomes available:

- Each court will be notified by the Office of the Chief Immigration Judge when numbers become available. Typically this happens in batches throughout the year. Within 5 days of becoming current, the IJ should revise and sign the decision and return it to the Court Administrator. If the background checks remain current, the decision will ordinarily be sent to the parties.

When the IJ is unavailable to sign:

- You may inherit cases from another IJ who reserved a decision but has since retired or left EOIR. Consult the OPPM-17-04 for the procedure to follow in this situation.

U.S. Department of Justice

Executive Office for Immigration Review

Office of the Chief Immigration Judge

Chief Immigration Judge

5107 Leesburg Pike, Suite 2500
Falls Church, Virginia 22041

December 20, 2017

MEMORANDUM

TO: All Immigration Judges
All Court Administrators
All Attorney Advisors and Judicial Law Clerks
All Immigration Court Staff

FROM: MaryBeth Keller
Chief Immigration Judge

SUBJECT: Operating Policies and Procedures Memorandum 17-04: *Applications for Cancellation of Removal or Suspension of Deportation that are Subject to the Cap*

Table of Contents

I. Introduction

This Operating Policies and Procedures Memorandum (OPPM) supersedes and replaces OPPM 12-01, *Procedures on Handling Applications for Suspension/Cancellation in Non-Detained Cases Once Numbers are no Longer Available in a Fiscal Year*. This OPPM is effective as to hearings that are concluded on or after January 4, 2018.

Section 240A(e) of the Immigration and Nationality Act (INA) provides that the Attorney General may not cancel the removal and adjust the status under INA § 240A(b), nor suspend the deportation and adjust the status under INA § 244(a)(1), of more than 4,000 aliens in any fiscal year. This annual limitation on grants of non-permanent resident cancellation of removal[1] and suspension of deportation is referred to as the "cap." This OPPM sets forth the procedures for handling cases involving cancellation of removal or suspension of deportation that are subject to the cap. *See* 8 C.F.R. § 1240.21(c).

When the cap is about to be reached, the Office of the Chief Immigration Judge (OCIJ) will notify Immigration Judges that they must reserve decisions granting cancellation or suspension, with some exceptions as described below. OCIJ is administering the cap so as to permit detained cases involving relief in the form of cancellation of removal or suspension of deportation to proceed to decision throughout the fiscal year. Accordingly, Immigration Judges are not required to reserve decisions in these detained cases. However, as explained below, court staff must enter certain specialized data into CASE even in detained cancellation and suspension cases.

In order to track cases in which hearings have been concluded, OCIJ has created the "Cancellation of Removal (CoR) Cap Date." The CoR Cap Date is a field in CASE located under the "Case Info" tab. It remains fixed in CASE regardless of whether either party files an appeal and regardless of any subsequent remand. The CoR Cap Date will therefore remain with the case irrespective of its posture before the Immigration Court or the Board. Guidance on setting the CoR Cap Date is included in Section VII, below.

II. Exceptions to Requirement to Reserve Decision

In the following situations, Immigration Judges are not required to reserve decision:

- The application is denied or pretermitted for any reason;
- The application pertains to a detained respondent; or
- The relevant application is one for suspension of deportation filed by a battered spouse or parent during proceedings in which the charging document was filed prior to April 1, 1997, or is an application for

[1] This memorandum pertains only to cancellation of removal for certain non-permanent residents pursuant to INA § 240A(b) and not to cancellation of removal for certain permanent residents pursuant to INA § 240A(a).

cancellation of removal under section 203 of NACARA. *See* INA § 240A(e)(3).

Note: When a cancellation or suspension application is denied, a CoR Cap Date will still be automatically generated even though the judge is not required to reserve decision. See sections VII and VIII, below. In cases covered by the third bullet, a CoR Cap Date will not be generated.

III. Concurrent Applications for Relief

If an Immigration Judge is going to grant an application for cancellation or suspension and there is a concurrent pending application for any other form of relief or protection, the Immigration Judge must address that other application as part of his or her reserved decision. If the Immigration Judge is going to deny a concurrent application for relief, but the decision must be reserved because of the cancellation or suspension cap, an adjournment code "RR" (Reserved Decision) must be entered into CASE.[2]

If the Immigration Judge grants an application for asylum or adjustment of status, the application for cancellation or suspension must be denied as a matter of discretion, so the decision need not be reserved (although a CoR Cap Date will still be automatically generated). 8 C.F.R. § 1240.21(c)(2). *See* section II (Exceptions to Requirement to Reserve Decision), above.

IV. Number Availability and Notification to the Immigration Courts

OCIJ will alert the Immigration Courts when there are no available numbers for the remainder of the fiscal year, and OCIJ will designate a "cut-off date." As of the cut-off date, Immigration Judges must reserve decisions granting cancellation or suspension until further notice from OCIJ for all non-detained cases. However, Immigration Judges may continue to deny cancellation or suspension after the cut-off date.

V. At the Conclusion of the Hearing

When the Immigration Judge denies or pretermits a cancellation or suspension application for any reason, the decision should be issued and not reserved. Court staff should enter the decision into the CASE system, reflecting a denial of the application for cancellation or suspension.

When concluding a hearing on cancellation or suspension after the cut-off date, where the cancellation or suspension application is potentially going to be granted, the Immigration Judge must reserve the decision, taking the following steps:

[2] If an asylum application was withdrawn, then adjournment code 23 must be used.

1. Ask DHS to confirm on the record that background checks are current and complete and to state the expiration date of the background checks;[3]

2. Record on the worksheet the date and time the potential grant is reserved. The worksheet should remain in the left-hand side of the Record of Proceedings. The worksheet and ROP should be given to the court staff to record the reserved information into CASE. *See* section VII, below.

3. Prepare a draft reserved decision. *See* section VI, below.

VI. Preparing the Draft Reserved Decision

When granting cancellation or suspension, Immigration Judges may not reschedule a case for the purpose of issuing a decision once a number becomes available for that case. Instead, after completing the worksheet the Immigration Judge must prepare a draft decision in one of the following two ways:

1. **Draft Dictated Decision.** Within 15 workdays, the Immigration Judge may dictate a draft decision outside the presence of the parties. The draft decision should be recorded electronically using the Microsoft Recorder on the judge's workstation and then stored on the EOIR network. OCIJ will transfer the recording to the Transcription Unit to render a Word document of the draft decision, and this will be e-mailed back to the Immigration Judge once completed.[4]

   Upon receipt of the draft decision, the Immigration Judge should review, and edit if necessary, the decision within 5 workdays. Once the judge is satisfied with the decision, the judge should print the decision and give it with the ROP to the Court Administrator (CA), indicating that it is ready for issuance as of that date but has not been signed. Within 5 days of being notified that a number is available, the judge will revise the decision, if necessary, and sign and return it to the CA for issuance.

   Note: Immigration Judges must not record a draft decision using the Digital Audio Recording (DAR) system.

2. **Draft Written Decision.** Immigration Judges may prepare a draft written decision. If an Immigration Judge chooses to draft a written decision, it must be completed within 60 workdays after the hearing.[5] Once the judge is satisfied with the decision, the judge should give the decision and the ROP to the CA,

[3] Immigration Judges need no longer record on the worksheet the status or the expiration date of the background checks.

[4] Immigration Judges may be instructed not to use this method of preparing a draft decision during the final months of the fiscal year.

[5] This sixty-day time frame may be shortened during the final months of the fiscal year.

indicating that it is ready for issuance as of that date but has not been signed. Within 5 days of being notified that a number is available, the judge will revise the decision, if necessary, and sign and return it to the CA for issuance.

Note: When reserving a decision, in no case should a draft decision be released to the parties or to the public.

VII. Setting the CoR Cap Date

When a cancellation or suspension hearing is concluded, court staff must update CASE as follows:

- Reserved decisions: If the Immigration Judge is granting cancellation or suspension, court staff must enter the date and time the Immigration Judge reserved the decision and that the decision is a potential CoR Cap Grant.

- Non-Reserved decisions: When an Immigration Judge is issuing a final decision, court staff must enter the appropriate application decision code and case decision code in CASE. *See* section II, above.

Entry of this information into CASE by court staff automatically generates the CoR Cap Date. Court staff no longer needs to fax the worksheets to OCIJ.

VIII. Tracking Reserved Decisions

CAs must establish a tracking system for reserved decisions in their courts so that when the CA is notified that numbers are available, the correct decisions are ready to be issued. The tracking system must be designed to ensure that the CA can monitor whether the reserved decisions have been drafted within the deadlines stated in this OPPM. *See* section VI, above.

IX. Procedure When an Immigration Judge is Unavailable to Issue a Reserved Decision

If the Immigration Judge who drafted the reserved decision is unavailable to issue that decision when a number becomes available, an Assistant Chief Immigration Judge shall reassign the case to him or herself or to another Immigration Judge. The newly-assigned Immigration Judge "shall familiarize himself or herself with the record in the case" and shall state in the written decision "that he or she has done so." 8 C.F.R. § 1240.1(b). The newly-assigned Immigration Judge is not bound by the original Immigration Judge's preliminary decision but should consider, among all the other facts and circumstances present, that the original Immigration Judge had an opportunity to see and hear the witness(es) testify.

X. Issuing Decisions Granting Cancellation or Suspension

Cases in which the Immigration Judge grants cancellation or suspension are placed into a queue based on the chronological order of their CoR Cap Dates. When numbers become available, OCIJ will determine which reserved decisions may be issued based on their place in the queue.

Prior to allowing the issuance of the decisions that are in the queue, OCIJ will notify DHS of the A-numbers so that DHS can verify that the background checks are current and complete.[6] In detained cases, the court should ensure that DHS has verified that background checks are current and complete.

Once DHS has verified the status of the background checks, court staff should enter the following into CASE:

1. The application decision code "F" (cancellation or suspension grant which is subject to the cap);

2. The case decision code "Q" (Final Grant of EOIR 42B/40); and

3. The codes as appropriate for other applications for relief.

After entering the appropriate codes in CASE, court staff should date and serve the decision and place the original (signed and dated) on the right side of the ROP with the transmittal letter (CASE notice FF).

XI. Conclusion

This OPPM sets forth the procedures for handling cases involving cancellation of removal or suspension of deportation that are subject to the cap. If you have any questions regarding this memorandum, please contact your ACIJ.

[6] If DHS determines that the background check has revealed new criminal history or that the respondent has not complied with biometrics requirements, DHS will decide whether to file a motion to recalendar and, if so, will file the motion as usual with the court.

LPR Cancellation Hypo

Samuel is a 45 year old LPR from Liberia. He first came to the U.S. in 1996 with a student visa. He adjusted to LPR in 2000, on the basis of his marriage to Mary, a USC. They divorced in 2005. Samuel is now married to Hannah, his childhood sweetheart from Liberia. Hannah is also a USC and the mother of his two children ages 12 and 15.

In 2013, Samuel was convicted of credit card fraud. He did not serve jail time, but was ordered to pay restitution to the victims of $12,000 total. He also has a 2002 conviction for larceny. The NTA served in 2014 alleges that Samuel first married Hannah in Liberia in 1996 and that he failed to disclose this when he adjusted status. It also cited both of the convictions. It contains two charges:

- 237(a)(1): inadmissible at the time of entry or adjustment under 212(a)(6)(C)(i) (misrepresentation); and
- 237(a)(2)(A)(i)(I) (conviction for CIMT within five years of admission).

1. Discuss removability.

2. Samuel insists that he first married Hannah in Boston in 2010. He seeks to apply for cancellation of removal for LPRs (Form EOIR-42A). Discuss his eligibility.

3. What if his conviction for credit card fraud is vacated for ineffective assistance of counsel?

4. What is Samuel travelled to Liberia in 2015. When he returned, he was placed in proceedings and charged under section 212 as an arriving alien: 212(a)(7) immigrant not in possession of a valid immigrant document, 212(a)(6)(C)(i) misrepresentation, and 212(a)(2)(A)(i)(I) CIMT? Is he inadmissible on these charges? How does this impact his eligibility for cancellation or any other relief?

5. What if any other remedies might apply? How might you manage these issues?

UNITED STATES DEPARTMENT OF JUTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BOSTON, MASSACHUSETTS

In the Matter of: _____ In _____ Proceedings
A: _____
Charge(s): _____
Application(s): **Cancellation of Removal for Certain Permanent Residents, INA section 240A(a)**
On Behalf of Respondent: _____
On Behalf of DHS: _____

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a _____ year-old native of _____ and citizen of _____. (He/she) seeks cancellation of removal for certain permanent residents.

Removability

The Respondent was placed in removal proceedings when the Notice to Appear was filed with the Immigration Court on _____. The NTA charges the Respondent with _____ under INA section(s) _____. The Respondent, (through counsel), has previously admitted and conceded the allegations and charges in the NTA. [or DHS bears the burden of proving removability by clear and convincing evidence and insert analysis…]. I find that the Respondent is removable as charged and designate _____ as the country of removal if necessary.

Statement of the Law

Cancellation of removal for certain permanent residents is available to an alien who: (a) has been lawfully admitted for permanent residence for not less than five years; (b) has resided in the United States continuously for seven years after having been admitted in any status; and (c) has not been convicted of an aggravated felony. *See* section 240A(a) of the Act. As cancellation of removal is a discretionary form of relief, the alien must show that he merits a favorable exercise of discretion. *Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998). The Court should consider the record as a whole and balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his favor to determine whether a grant of relief would be in the best interests of this country. *See id*.

Aliens not Eligible for Cancellation:

1) Previously granted cancellation, suspension of deportation under old 244(a), or 212(c) waiver
2) Alien entered as crewman after June 30, 1964
3) Certain aliens admitted as J nonimmigrant or later acquiring such status. (*see* 240A(c)(2), (3))
4) Inadmissible under 212(a)(3) or removable under 237(a)(4) (security grounds)
5) Alien described in 241(b)(3)(B)(i) (persecutor of others)

See INA § 240A(c).

LPR CANCELLATION OF REMOVAL

Eligibility (*see* INA § 240A(a)):

1) <u>LPR for 5 years</u>

-- Obtaining LPR status through fraud renders an alien ineligible. *See Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003). Consider waiver under 237(a)(1)(H) in fraud cases. *But see Matter of Tima*, 26 I&N Dec. 839 (BIA 2016).

2) <u>Resided in the United States continuously for 7 years after having been admitted in any status</u>

-- Stop-Time Rule (*see* INA § 240A(d)(1)): Continuous physical presence ends at the *earliest* of service of the NTA* *or* commission of an offense referred to in INA § 212(a)(2) that renders Respondent inadmissible under section 212(a)(2) or removable under section 237(a)(2) or 237(a)(4). *See* Ilana J. Snyder, *IIRIRA at 20 Years: An Overview of the Breadth and Depth of the Stop-Time Rule*, IMMIGR. L. ADVISOR (Exec. Office for Immigr. Rev.), May-June 2017 at 1-4, 14-20.

- Note: The circuits are split about whether an LPR who is not currently seeking admission can be "rendered inadmissible" (by a criminal conviction) and trigger the stop-time rule. Most circuits that have ruled on the issue have held that an LPR can be "rendered inadmissible" without seeking admission. *See Barton v. U.S. Attorney General*, --- F.3d ---, 2018 WL 4571778 (11th Cir. 2018); *Heredia v. Sessions*, 865 F.3d 60, 67 (2d Cir. 2017); *Calix v. Lynch*, 784 F.3d 1000, 1008-09 (5th Cir. 2015); *Ardon v. Att'y Gen. of the U.S.*, 449 Fed. App'x 116, 118 (3d Cir. 2011); *but see Nguyen v. Sessions*, 901 F.3d 1093 (9th Cir. 2018).

- Commission of firearms offense does NOT stop time because it is not "referred to" in section 212(a)(2). *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000).

- A petty offense will not stop time for an LPR. *See Matter of Deanda-Romo*, 23 I&N Dec. 597 (BIA 2003) (Respondent, convicted of two misdemeanor CIMTs, is not precluded by stop-time rule from establishing 7 years of continuous residence because his first crime, which qualifies as a petty offense, did not render him inadmissible, and he had accrued 7 years of continuous residence before the second offense was committed).

*The Supreme Court in *Pereira v. Sessions*, 585 U.S. ____ (2018) held that an NTA that fails to designate the specific time and place of removal proceedings is not an NTA under section 239(a) of the Act, thus failing to trigger the stop time rule in non-LPR cancellation cases and raising the question of whether that applies to LPR cancellation.

3) <u>No convictions for any aggravated felony</u>

-- If aggravated felony, consider waiver under 212(c) for convictions pre 04/24/1996, or 212(h) for LPRs of seven years who adjusted status. *See Matter of J-H-J-*, 26 I&N Dec. 563 (BIA

2015).

4) <u>Discretion</u>

-- The standards articulated in *Matter of Marin*, 16 I&N Dec. 581, 584-585 (BIA 1978), apply. *See Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998).

Positive Factors	Negative Factors
- Family ties within the U.S. - U.S. residence of long duration - Hardship to Respondent and family if removed - U.S. military service - Work history - Property or business ties - Community service - Rehabilitation if criminal record exists	- Nature/circumstances of the grounds of removal - Additional significant violations of U.S. immigration laws - Criminal record and its nature, recency, and seriousness

-- As the negative factors grow more serious, the Respondent must show additional offsetting favorable evidence and in some cases show unusual and outstanding equities. *Matter of C-V-T-, supra*.